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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

OSCAR MALKHOO, Plaintiff and Appellant, v. CITY OF LONG BEACH, Defendant and Respondent.	B173806 (Super. Ct. No. NC 033190)

APPEAL from a judgment of the Superior Court of Los Angeles County. Margaret M. Hay, Judge. Affirmed.

Hugo Wm. Anderson Jr., and Hugo Wm. Anderson, Jr. for Plaintiff and Appellant.

Robert Shannon, City Attorney, and Barry M. Meyers, Deputy City Attorney, for Defendant and Respondent.

Oscar Malkhoo appeals from the judgment entered against him and for the City of Long Beach (City) following a bench trial in which the court ruled in favor of City on whether it was liable for just compensation in Malkhoo's cause of action for inverse condemnation.[1] We affirm.

BACKGROUND

The factual underpinnings of this matter were set out in a stipulation. City filed two declarations.

The Stipulated Facts. Malkhoo owned the property and improvements at 342 Eliot Lane (the Property). The Property was constructed around 1923 as part of a small subdivision. The sewer lines located in Eliot Lane were attached to City's sewer system as part of the development. Malkhoo occupied the Property as his principal residence for a number of years (apparently since 1977), including immediately before June 17, 2002.

City owned and operated the sewer system which collected, concentrated and transported sewerage effluent in City as a public improvement. The system is maintained by City as part of that public improvement. The system collects and transports effluent within the City street partially proximate to the Property. The system lies generally lateral to and below the surface of the Property within the City street (Eliot Lane). The system acts as a collector for discharge from properties in and around the Property.

On June 17, 2002, the system failed to transport the effluent from the Property, resulting in the discharge of between 5,000 and 10,000 gallons of raw sewage and impairing use of the Property. The system "as installed or maintained by the defendant City has a risk of discharge of sewerage effluent in and onto private and/or public property in the event" it fails. Following its acceptance of the system, City undertook to maintain it. To that end, City adopted a plan of periodic inspection, repair and

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[1] Because the trial court ruled against Malkhoo on liability, damages were not addressed in the trial court.

maintenance. City claims it received no prior complaint about operation of the system at or about the Property before the June 17, 2002, incident.

"[A]pparently the [system] became clogged by . . . tree roots in the sewer line, which roots were from a privately owned tree within the region." City owned no trees within the region of the sewer failure.

Malkhoo filed a claim for damages against City that was rejected. He has received no compensation for the damage to his property. City contends "the design and construction of the sewer system was done in accordance with generally accepted engineering principles utilized for municipal sewer systems at the time of the construction of the relevant subdivision. Further, that the design of the system was, and is, appropriate for the improvements that are currently located on the properties that the sewer system serves." The Eliot Lane system currently serves 83 lots with 9.93 acres. Its capacity exceeds the sewage flow by approximately 12 times at half full (4" of an 8" pipe).

City contends the maintenance plan, as conceived, is appropriate for the type of sewer system utilized by City and that the plan equals or exceeds that of other local governmental entities.

Villanueva Declaration. Robert Villanueva, a Division Engineer in the Sewer Systems Division of City's water department added that the lots served by the Eliot Lane sewer mains are zoned R2N, two-family residential lots with a density of 15 units per acre. City's system consists of interlocking pipes sloped downward to create a gravity flow from adjacent properties until effluent reaches the Los Angeles County Sanitation District's main sewer line. (The map accompanying Villanueva's declaration shows that Eliot Lane is a North-South street. The Property is the second lot south of Colorado Street. As the system passes the Property, going north, it has collected effluent from approximately 74 of the 83 lots in the subdivision. After it passes the lot north of the Property, the system turns west under Colorado Street, joins the pipe transporting effluent from properties east and north of Eliot Lane, and immediately thereafter turns and sends

all effluent north again.) The system is of the type traditionally used by cities in the region.

Rennegarbe Declaration. David Rennegarbe, Sewer Operations Superintendent, declared that in 1994, City's water department conducted a survey of "various local municipalities" to determine sewer maintenance procedures and frequency for local governmental agencies. Eight agencies responded. The responses ranged from "as needed only" (the City and County of Los Angeles) to every 12 months (County of San Diego).[2] In contrast to the City's description in its brief of City's two-year inspection and cleaning review as a "plan," Rennegarbe referred to it as "a stated goal."

City acknowledged that "the area in question" had not been inspected "for approximately 3 . . . years" before the Property was flooded. Malkhoo sought damages of $150,000 or an amount according to proof.

The Trial Court Ruling. The trial court ruled it was "undisputed that the plaintiff's residential real property was seriously damaged on 6/17/02 when between 5,000 and 10,000 gallons of raw sewage effluent discharged from the public sewer system owned and maintained by the defendant City . . . . It is also undisputed that the blockage which caused the discharge was due to roots from a tree located on private property."

The court said Malkhoo contended the applicable standard was one of strict liability under *Holtz v. Superior Court* (1970) 3 Cal.3d 296, 310. "However, for strict liability to apply, even under [*Holtz*], the damage must be caused by a public improvement 'as deliberately designed and constructed.' See e.g. [*Albers v. County of Los Angeles*] (1965) 62 Cal.2d 250, 263-264]. [¶] The court finds that the sewage did not discharge by reason of any deliberate design or construction element. The declaration of David Rennegarbe . . . establishes that inspection and cleaning of the 8" sewer line on Eliot Lane is conducted every 24 months, an interval that comports with most of the

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[2] The "Sanitation Districts of Los Angeles County" responded they cleaned "12 months initially establishing cleaning history then 60 months or less as needed." The City of Riverside responded "per 36 months." The City of San Diego Water Utilities responded "per 18-36 months."

surrounding Counties and Municipalities. The declaration of Robert Villanueva . . . establishes that the sewer system conforms to generally accepted engineering principles for sewer systems. Plaintiff has offered no evidence to rebut these points. These facts distinguish this case from [*Pacific Bell v. City of San Diego*] (2000) 81 Cal.App.4th 596, where a City had no plan for testing and inspection. The [*Pacific Bell*] court found that the policy of replacing pipes only when they broke satisfied the 'deliberate' prong for strict liability in inverse condemnation. [¶] Defendant took no actions nor committed any omissions which can be characterized as 'deliberate.' Plaintiff's damages, while severe and unfortunate, cannot be deemed a public taking."

DISCUSSION

The parties agree that the flooding was not the result of a design defect or flawed construction.

Failure to Comply with City Maintenance Plan. Malkhoo contends, as the stipulation states, that the Eliot Lane sewer system, as maintained by City, risks discharge of effluent in and onto private, or public, property if the system fails. He says the adequacy of City's maintenance plan as adopted is not at issue; City's maintenance of the system *is*, however, at issue. He states that "[b]y reason of either deliberate act or omission," City did not timely inspect the system pursuant to its own maintenance plan. He claims City's "deliberate avoidance" of its maintenance plan substantially contributed to his loss and entitled him to a recovery in inverse condemnation.

City acknowledges that the reasonableness standard applied in other inverse condemnation contexts does not apply to City's failure to comply with its stated plan for sewer system maintenance. Instead, "[t]he standard is 'deliberateness.' The deliberate design, construction or maintenance plan, as conceived, must have been the substantial cause of the damage." City states that the declarations of the two City employees formed the factual foundation for the trial court's determination that the system as deliberately

designed, constructed and maintained was not the cause of damage. City says Malkhoo failed to present evidence rebutting those two declarations.

The trial court's statement that the Rennegarbe declaration established that inspection and cleaning of the Eliot Lane sewer line was conducted every 24 months was, however, a misstatement. Rennegarbe said City's stated goal was 24 months; he did not state the Eliot Lane line was inspected and cleaned at two-year intervals. The stipulation established that the Eliot Lane line had not been inspected for three years as of June 17, 2002.

The trial court also referred to Villanueva's statement that the sewer system "conforms to generally accepted engineering principles for sewer systems." As noted, the parties state that neither the design nor construction of the system is at issue. Accordingly, we focus on the question of "deliberateness" with respect to City's stated maintenance plan.

"'Private property may be taken or damaged for public use only when just compensation, ascertained by a jury unless waived, has first been paid to, or into court for, the owner.' (Cal. Const., art. I, § 19 . . . .) When a public use results in damage to private property without having been preceded by just compensation, the property owner may proceed against the public entity to recover it. Such a cause of action is denominated 'inverse condemnation.' [Citation.]" (*Arreola v. County of Monterey* (2002) 99 Cal.App.4th 722, 737-738.) Where the arguments relate to facts that are materially undisputed, we apply an independent review. (*Id*. at p. 737.)

A public entity's maintenance of a public improvement constitutes the constitutionally required public use so long as it is the entity's deliberate act to undertake the particular plan or manner of maintenance. (*Bauer v. County of Ventura* (1955) 45 Cal.2d 276, 284-285.)

"The necessary finding is that the wrongful act be part of the deliberate design, construction, or maintenance of the public improvement. 'The fundamental justification for inverse liability is that the government, acting in furtherance of public objectives, is

taking a calculated risk that private property may be damaged.' [Citation.] That is why simple negligence cannot support the constitutional claim. . . . That is not to say that the later characterization of a public agency's deliberate action as negligence automatically removes the action from the scope of the constitutional requirement for just compensation. So long as the entity has made the deliberate calculated decision to proceed with a course of conduct, in spite of a known risk, just compensation will be owed. [Citation.]" (*Arreola v. County of Monterey, supra,* 99 Cal.App.4th at p. 742.)

Two cases have ruled that inadequate maintenance of public pipe systems can support liability in inverse condemnation: *McMahan's of Santa Monica v. City of Santa Monica* (1983) 146 Cal.App.3d 683, 696-698, (*McMahan's*) disapproved on other grounds, in *Bunch v. Coachella Valley Water Dist.* (1997) 15 Cal.4th 432, 447-451, and *Pacific Bell, supra,* 81 Cal.App.4th 596.

McMahan's insurer, who had paid its insured for the loss, sought compensation for damage to a building and merchandise resulting from a ruptured, corroded water main owned and operated by the city. Division 3 affirmed the trial court's determination of liability in inverse condemnation. Evidence had been produced at trial that the city had a maintenance program which was known to be inadequate because of information provided the city in a recent city-prepared budget report and water study. The city had installed the unlined water main under the alley behind McMahan's in 1924. The city presented evidence that it had an ongoing water main replacement program. However, McMahan's evidence included the budget report and water study establishing that at the time of the break, the main had been in use for 51 years notwithstanding its assumed lifetime was 40 years. (*McMahan's*, *supra*, 146 Cal.App.3d at pp. 687-688.) The water main had corroded to the point where failure was imminent.

The city presented evidence that in the late night and early morning hours immediately preceding the break, vandals had opened several fire hydrants in the area, causing high pressure shock waves that damaged the pipe and resulted in the "geyser." (*McMahan's*, *supra*, 146 Cal.App.3d at p. 688.) The trial court found the corrosion was a

substantial cause of the break and concluded as a matter of law that McMahan's property suffered physical damage proximately caused by the water maintained as deliberately planned and designed by the city.

The appellate court held that Santa Monica "was taking a calculated risk by adopting a plan of pipe replacement and maintenance that it knew was inadequate. [Santa Monica's] plan of replacement of the water mains reflected the deferred risks of the project both foreseeable and unforeseeable, and it is proper to require the City to bear the loss when the damage occurs." (*McMahan's, supra,* 146 Cal.App.3d at pp. 697-698.)

In *Pacific Bell*, the city had no preventive maintenance plan to inspect or monitor the effect of corrosion on old cast-iron water system pipes. A pipe burst, damaging adjoining property owned by Pacific Bell. The appellate court reversed the trial court's judgment for the city. The court stated that the city replaced an older cast-iron pipe "if it breaks, or if there is a change of service, or in conjunction with replacing the water main to which it is attached." (*Pacific Bell*, *supra*, 81 Cal.App.4th at p. 600.) In the 10 years before the subject break, the city council had denied 28 requests for a water rate increase to fund water pipe repair and rehabilitation efforts, including replacing cast-iron pipes. The subject pipe was installed in 1958 and burst only because it was corroded.

"[T]he deliberateness requirement is satisfied by a public improvement that as designed and constructed presents inherent risks of damage to private property, and the inherent risks materialize and cause damage. [Citation.]" (*Pacific Bell*, *supra*, 81 Cal.App.4th at p. 607.)

As noted, Malkhoo and City stipulated that City claimed it received no prior complaint about operation of the system at or about the Property before the June 17, 2002, incident. The parties further stipulated that the system maintained by City presented a risk of flooding effluent onto private property if the system failed.

We examine the applicability to this matter of the two factors present in *McMahan's* and *Pacific Bell* -- knowledge of the likelihood of imminent system failure if pipes were not replaced and an affirmative decision not to act on the known risk. In

contrast to those cases, City had a plan, the adequacy of which Malkhoo does not contest, and Malkhoo stipulated to the fact that City claimed it had no prior notice of any problem with the system. Instead, although aware of the risk of effluent flooding if the system failed, City did not comply with its plan to inspect the system built in 1923 and Malkhoo's property was flooded.

City says that its deviation from its stated plan was not deliberate. The alternative explanation for failure to comply with its plan was City negligence, a failure not susceptible to an award of damages in inverse condemnation. (*House v. L. A. County Flood Control Dist*. (1944) 25 Cal.2d 384, 396 (conc. opn. of Traynor, J.) ["The destruction or damaging of property is sufficiently connected with 'public use' as required by the Constitution, if the injury is a result of dangers inherent in the construction of the public improvement as distinguished from dangers arising from the negligent operation of the improvement"].)

As noted, the issue was whether City's failure to adhere to the two-year plan was deliberate or negligent. Malkhoo had the burden of establishing deliberateness. He presented nothing on the order of magnitude of the evidence presented in *Pacific Bell* and *McMahan's*, which compelled the conclusion that the cities there involved, knowing the precise risks involved, chose to undertake the risk of system failure by adopting no plan. The stipulation that there was a risk of effluent flooding if the system failed was not alone sufficient to establish that City deliberately chose not to meet its plan, and Malkhoo offered no other evidence tending to show a deliberate decision was made not to comply with the City's plan.

DISPOSITION

The judgment (December 19, 2003, order) is affirmed. City is awarded its costs on appeal.

NOT TO BE PUBLISHED.

SUZUKAWA, J.*

We concur:

SPENCER, P. J.

MALLANO, J.

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* (Judge of the L. A. Sup. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.)